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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. ~~12~~ 6, Original

UNITED STATES OF AMERICA,

Plaintiff,

vs.

STATE OF CALIFORNIA,

Defendant.

BRIEF OF THE STATE OF NEW YORK, *AMICUS CURIAE*

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BRIEF OF THE STATE OF NEW YORK, *AMICUS CURIAE*

Statement

This brief is respectfully submitted pursuant to paragraph 9 of Rule XXVII of the Rules of this Court.

The State of New York cannot, of course, be bound by any adjudication made in this litigation. As one of the original thirteen States, it is deeply disturbed, however, by some of the claims made and issues raised by the plaintiff in the prosecution of this cause, the expressed purpose of which is to establish "the rights of the United States in the bed of the Pacific Ocean adjacent to the coast of California beginning at low-water mark and extending seaward for three nautical miles".

On page 4 of the Statement in Support of Motion to file the complaint, it is asserted that at the time of the formation of the Union, the first thirteen States did not own the land underlying the three-mile belt. This theory is repeated at page 10 of the plaintiff's brief and is expanded and argued under Point III (B) of its brief.

The United States urges in summary that the decisions of this Court which support this State's title to lands under navigable waters have no application to the three-mile belt (hereinafter referred to as coastal waters). A different rule applies, it is argued, to the so-called inland navigable waters (rivers, bays, etc.) and tidal waters (between high—and low-water marks) then applies to coastal waters. Not content with its attempt to point out the inapplicability of this Court's decisions, plaintiff attacks the soundness of these decisions as applying as well to lands under inland navigable waters and tidal waters. These decisions have proceeded, in the plaintiff's opinion, upon a false premise (Brief, pp. 9, 140). A further argument is presented that several of the original States never have claimed the marginal sea as being within their boundaries—that is, no declaration of title or fixing of boundaries is to be found in the constitutions or statutes of the States.

These novel, unsupported and improper theories of the law of property are of grave concern to the State of New York. As stated, *supra,* the decision herein cannot be a direct adjudication of this State's title to its submerged lands. Yet these theories are another of a series of clouds upon its title to all its submerged lands, inland and tidal as well as coastal, originating some nine years ago in the demands of administrative agencies and departments of the Federal Government for an assertion by Congress of title in the United States of submerged lands along the coast out to the three-mile limit whereon large petroleum

deposits might be found (S. J. Res. 208, 75th Cong., 1st sess.). These clouds are not dissipated by the plaintiff's statement that no question is presented as to inland and tidal waters, as witness the attack on the principle laid down by this Court recognizing the State's title to lands under such waters as an incident of State sovereignty.

Summary of Argument

Exhaustive and able treatment of the historical basis and development of the law relating to sovereign rights in submerged lands, has been made in other briefs in opposition to the motion now before this Court. We see no need for repetition and, therefore, restrict our argument, in the main, to an affirmative position. It is presented under the following broad principles:

A. The State of New York, since the Revolution, as a free and independent sovereign and as one of the original States, has owned and has exercised jurisdiction and dominion over all lands under the ocean seaward a distance of three miles and lands under all tidal and navigable waters. The State's title to these lands is based upon the sovereign character of the People of the State as the successors to the sovereign rights of the Crown of England.

B. The basic principle of the State's title to these lands has been recognized and decreed by this Court.

C. The Government of the United States has recognized and honored throughout the years, until recently, the State's title to such submerged lands. Its present position is not founded on legal principle, is contrary to legal precedent, and is an unwarranted attack on the law of property and the sovereign rights of the State of New York.

ARGUMENT

POINT I

The State of New York is the owner of the lands under its coastal waters out to the three-mile limit and has exercised jurisdiction and dominion over said lands.

A. Source of Title

The State's title to these lands, in common with all unappropriated lands, was and is based upon the sovereign character of the People of the State as the successors, following the Revolution, to the sovereign rights of the Crown of England.

There is no room for doubt of the State's title to submerged lands both under tidal waters and under the marginal sea, if the fundamental structure of our government is kept in mind. The basic documents, beginning with the Declaration of Independence and extending through the adoption of the United States Constitution, all support this claim.

The Declaration of Independence in 1776 recognized that the several States were free, and therefore that each had the rights in its territory which had previously belonged to Great Britain. The concluding paragraph of the Declaration states in part:

> "That these United Colonies are, and of Right ought to be *Free and Independent States;* that they are absolved from all Allegiance to the British Crown, and that all political connexion between them and the State of Great Britain, is and ought to be totally dissolved; and that as *Free and Independent States,* they have full Power to levy War, conclude Peace, contract Al-

liances, establish Commerce, and to do all other Acts and Things which *Independent States* may of right do. And for the support of this Declaration, with a firm reliance on the protection of Divine Providence, we mutually pledge to each other our Lives, our Fortunes and our sacred honor." (emphasis added)

A year later, in 1777, the Articles of Confederation fixed the conditions on which the independent colonies joined their efforts for mutual defense. The essential part is Article II, which reads as follows:

> "Article II. Each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled."

Two years later, in 1779, nine years prior to the ratification of the Constitution of the United States, one of the earliest statutes of New York declared the State's absolute ownership in the lands previously held by the Crown of Great Britain. Section XIIII of Chapter 25 of the Laws of 1779 provided:

> "That the absolute property of all messuages, lands, tenements and hereditaments * * * and all right and title to the same, which next and immediately before the ninth day of July in the year of our Lord one thousand seven hundred and seventy six, did vest in, or belong, or was due to the Crown of Great Britain be, and the same and each and every of them hereby are declared to be, and ever since the said ninth day of July in the year of our Lord one thousand seven hundred and seventy six, to have been, and forever after shall be vested in the people of this State, in whom the sovereignty and seignory thereof, are and were united and vested, on and from the said ninth day of July in the year of our Lord one thousand seven hundred and seventy six."

A few years later when the Treaty of Peace was signed with Great Britain, the Crown of Great Britain surrendered its territorial rights of property to the several states naming them one by one. Article 1 of the Peace Treaty reads as follows:

> "His Britannic Majesty acknowledges the said United States, viz., New Hampshire, Massachuset's Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia, to be free, sovereign and independent States; that he treats with them as such, and for himself, his heirs and successors, relinquishes all claims to the Government propriety and territorial rights of the same, and every part thereof; * * *"

When the Constitution of the United States was ratified, the States made clear that they were not surrendering to the United States any property or rights not expressly ceded by the Constitution. So solicitous were the individual states about the retention and protection of their reserved rights that even after the Constitution had been adopted by ratification of the states, at the first session of the first Congress on March 4, 1789, ten amendments to the original document were proposed, and in explanation thereof the following preamble was written:

> "The conventions of a number of the states having, at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added, and as extending the grounds of public confidence in the government will best insure the beneficent ends of its institution."

The Tenth Amendment expressly reserved to the states and people respectively all powers not delegated to the United States by the Constitution.

It is as follows:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

B. Jurisdiction and dominion exercised by the State of New York

New York State has always exercised ownership of lands under water within its boundaries, including lands below low water.

In 1828 the Legislature of the State enacted (Ch. 1, Title 1, sec. 1 of Part II, Revised Statutes, 1828) that, "The people of this state, in their right of sovereignty, are deemed to possess the original and ultimate property in and to all lands within the jurisdiction of the State."

This language was lifted bodily into the 1846 Constitution of the State (Art. 1, § 11) and is now found in Article 1, section 10 of the present Constitution. Discussing this constitutional provision, the Court of Appeals of New York in *People* v. *Trinity Church,* 22 N. Y. 44 (1860), said (p. 46):

> "The Constitution, in the clause mentioned, (the sovereignty clause) does not declare a mere presumption of a present title which can be repelled by proving a grant from the State, but an absolute rule of political sovereignty, * * *. When, by the Revolution, the Colony of New York became separated from the Crown of Great Britain, and a republican government was formed, The People succeeded the King in the ownership of all lands within the State which had not already been granted away, and they became from thenceforth the source of all private titles."

Within ten years after the State of New York came into being, the Legislature, by Chapter 67 of the Laws of 1786, created the Board of Commissioners of the Land Office and placed under its jurisdiction all of the State's lands under

navigable water. The act also made it lawful for the said commissioners to grant such and so much of the lands under the waters of navigable rivers as they deemed necessary to promote the commerce of the State. This law has been carried on the books of the State to the present time with but slight amendments and is now generally known as Section 75 of the Public Lands Law.

By Chapter 232 of the Laws of 1835 the powers of the board were enlarged so as to authorize the grants of land under water adjacent to and surrounding Long Island, which includes those lying under the Atlantic Ocean. This provision is now found in subdivision 6 of section 75 of the Public Lands Law of New York. Under its provisions the Board of Commissioners of the Land Office is authorized to make grants of land under water and of the use, occupation and jurisdiction thereof.

Pursuant to the authority thus vested in the board, thousands of upland owners have made application to the Board of Commissioners of the Land Office and in pursuance thereof the board has sold millions of dollars worth of the State's lands under water to these adjacent upland owners, and they, in turn, have spent millions of dollars on improvements. At least forty-four such grants have been made of lands under the Atlantic Ocean adjacent to the south shore of Long Island, all extending beyond the low-water mark, and in some instances as much as 2500 feet.

One such grant was considered by the Court of Appeals of New York in *People* v. *Steeplechase Park Co.*, 218 N. Y. 459. The grant was for lands under the waters of the Atlantic Ocean, extending approximately 1375 feet into the Ocean beyond the low-water mark. The decision, which is discussed in detail hereafter, was to the effect that the title to these lands was in the State of New York.

The State of New York has enacted, throughout the years, statutes regulating the taking and killing of birds, fowl and fish in and upon all its navigable waters including coastal waters. Chapter 785 of the Laws of 1868, *e. g.*, provided that no person should kill, or molest with intent to kill, "any wild duck, geese or other wild fowl while the same are sitting at night upon their resting places. But this section shall not apply to waters of Long Island Sound or the Atlantic Ocean." This Court in *Smith* v. *Maryland*, 18 Howard 71, 59 U. S. 71, has held that this regulatory power results from the ownership of the soil, from the legislative jurisdiction of the State over it, and from its duty to preserve unimpaired those public uses for which the soil is held.

In 1912, the Legislature of New York in its regulation of fisheries defined the Marine District as including "all waters in and adjacent to Long Island and all tidal waters of the State." (N. Y. Laws, 1912, c. 318). By amendment in 1925 (N. Y. Laws, 1925, c. 350), the Marine District was declared to include "all tidal waters within three nautical miles of the state coast" except the Hudson and East Rivers, the latter river of which was taken from the exception in 1935 (N. Y. Laws, 1935, c. 86).

Too, the State of New York has exercised its dominion and jurisdiction over the lands under the waters of the Atlantic Ocean out to the three-mile limit in assessing as special franchises the use of said lands by cable companies. These assessments have been levied for many years since the creation of special franchises as taxable property (Laws of New York 1899, c. 712). The assessments have specifically designated the property used as between the low-water mark and the three-mile limit. See *People ex rel. Mexican Telegraph Company* v. *State Tax Commission, et al.*, 219 App. Div. (N. Y.) 401.

To the same effect, it was stated in Mr. Justice Stone's opinion for the Court in the case of *Massachusetts* v. *New York,* 271 U. S. 65 (1926), at 85-86:

> "The English possessions in America were claimed by right of discovery. The rights of property and dominion in the lands discovered by those acting under royal authority were held to vest in the Crown, which under the principles of the British Constitution was deemed to hold them as a part of the public domain for the benefit of the nation. Upon these principles rest the various English royal charters and grants of territory on the Continent of North America. *Johnson* v. *McIntosh,* 8 Wheat. 543, 577 *et seq.,* 595. As a result of the Revolution, the people of each State became sovereign and in that capacity acquired the rights of the Crown in the public domain *(Martin* v. *Waddell,* 16 Peters 367, 410)."

Jurisdiction over the sea within the three-mile limit was expressly approved by this Court in *Manchester* v. *Massachusetts,* 139 U. S. 240 (1891), where the Court stated:

At page 258:

> "We think it must be regarded as established that, as between nations, the minimum limit of the territorial jurisdiction of a nation over tidewaters *is a marine league from its coast;* that bays wholly within its territory not exceeding two marine leagues in width at the mouth are within this limit; and that included in this territorial jurisdiction is the right of control over fisheries, whether the fish be migratory, free-swimming fish, or free-moving fish, or fish attached to or embedded in the soil. The open sea within this limit is, of course, subject to the common right of navigation; and all governments, for the purpose of self-protection in time of war or for the prevention of frauds on its revenue, exercise an authority beyond this limit."

And at pages 263-264:

> "It is also contended that the jurisdiction of a State as between it and the United States must be confined

to the body of counties; that counties must be defined according to the customary English usage at the time of the adoption of the Constitution of the United States; that by this usage counties were bounded by the margin of the open sea; and that, as to bays and arms of the sea extending into the land, only such or such parts were included in counties as were so narrow that objects could be distinctly seen from one shore to the other by the naked eye. But there is no indication that the customary law of England in regard to the boundaries of counties was adopted by the Constitution of the United States as a measure to determine the territorial jurisdiction of the States. *The extent of the territorial jurisdiction of Massachusetts over the sea adjacent to its coast is that of an independent nation;* and, except so far as any right of control over this territory has been granted to the United States, this control remains with the State." (emphasis added)

The case of *Humboldt Lumber Manufacturers' Ass'n.* v. *Christopherson,* 73 Fed. 239 (1896), which incidentally involved lands under water within the three-mile limit of the State of California, contains a similar statement at page 244, that

> "The jurisdiction of the state of California over the sea is that of an independent nation."

and, further (p. 245):

> "Within what are generally recognized as the territorial limits of states by the law of nations, a state can define its boundaries on the sea, and the boundaries of its counties."

A case relating to the New York area is *Middleton* v. *La Compagnis Generale Transatlantique,* 100 Fed. 866 (1900) (2d cir.). The Court said, at pages 868-869:

> "In view of this last proposition, it might be sufficient to dispose of this case to call attention to the circumstance that it nowhere appears in the record that the

United States purchased Sandy Hook. Certainly this court does not know whether or not they did so. But, *assuming that they did purchase* what the act defines, viz. 'that portion' of Sandy Hook '* * * lying north * * * of Young's Creek * * * and extending across the island or cape of Sandy Hook from shore to shore, bounded on all *other sides by the sea* and Sandy Hook Bay,' *they certainly did not thereby obtain any land below low-water mark.* The purchase, if there was a purchase, and the act of cession, if it be susceptible of a construction which will bring it into harmony with the constitution, and thus make it a valid 'consent to the purchase,' gave to the United States the right to exercise exclusive legislation *only in so much of the state of New Jersey as was thereby transferred.*" (emphasis added)

That case was approved by this Court in *Hamburg American Steamship* v. *Grube,* 196 U. S. 413. The Court there overruled a contention that the Act of Congress of June 28, 1834 (4 Stat. 708), approving a fixing of boundaries between New York and New Jersey, vested exclusive jurisdiction over the adjoining sea in the Federal Government. Chief Justice Fuller's opinion held that even a cession by New Jersey to the United States of jurisdiction over a strip of land at Sandy Hook did not give the Federal Government exclusive legislative jurisdiction over the marginal sea and stated at pages 414-415:

"The New Jersey act of 1846 was merely one of cession, and the operation of the general laws of New Jersey was reserved as therein provided. *Fort Leavenworth R. R. Company* v. *Lowe,* 114 U. S. 525; *Chicago Rock Island & Pacific Railway Company* v. *McGlinn,* 114 U. S. 542.

"Moreover, as was held by the Circuit Court of Appeals for the Second Circuit, in *Middleton* v. *LaCompagnie Generale Transatlantique,* 100 Fed. Rep. 866, the act did not purport to transfer jurisdiction over the *littoral waters beyond low water mark,* and for the purposes of this case the public laws of New Jersey

must be regarded as obtaining there, *whether enacted prior or subsequent* to the cession." (emphasis added)

Another pertinent opinion is that of Judge Hough in *United States* v. *Newark Meadows Improvement Co.*, 173 Fed. 426 (1909), involving an indictment for dumping refuse in the ocean off New York Harbor, within a marine league on the boundary line between the State of New Jersey and New York. He stated (p. 429):

> "Both from the language quoted and from the nature of the decision in the *Manchester* case, it seems to me to follow that New Jersey may, in the exercise of its sovereignty, extend its own borders for the space of one marine league from low-water mark and make the region so annexed as much a portion of the state as any other part of its territory."

See also

Hardin v. *Jordan*, 140 U. S. 371, 381 (1891).

The source of New York State's title to lands under its navigable waters has been defined by its Courts. In the case of *People* v. *New York and Staten Island Ferry Company*, 68 N. Y. 71, 77, it was stated:

> "The title to lands under tide-waters in this country which before the revolution was vested in the king, became, upon the separation of the colonies, vested in the States within which they were situated. The people of the State in their right of sovereignty succeeded to the royal title, and through the legislature 'may exercise the same powers, which, previous to the revolution, could have been exercised by the king alone, or by him in conjunction with parliament, subject only to those restrictions which have been imposed by the Constitution of the State, and of the United States.' (Chancellor in *Lansing* v. *Smith*, 4 Wend. 9.) The public right in navigable waters was in no way affected or impaired by the change of title. The State, in place of the crown, holds the title, as trustee of a public

trust, but the legislature may, as the representative of the people, grant the soil, or confer an exclusive privilege in tide-waters, or authorize a use inconsistent with the public right, subject to the paramount control of congress, through laws passed, in pursuance of the power to regulate commerce, given by the federal Constitution. *(Rogers* v. *Jones,* 1 Wend. 261; *Gould* v. *H. R. R. R. Co.,* 6 N. Y. 522; *The People* v. *Tibbetts,* 19 N. Y. 523.)"

The New York law is further exemplified in *People* v. *Steeplechase Park Company,* 218 N. Y. 459 (1916), *supra,* which involved a State grant of land under water in the Atlantic Ocean at Coney Island extending approximately 1375 feet seaward from the low-water mark. The Board of Commissioners of the Land Office had issued this grant in 1897. The Court of Appeals stated (p. 473):

"In this country the state has succeeded to all the rights of both crown and Parliament in the navigable waters and the soil under them, and here the *jus privatum* and the *jus publicum* are both vested in the state.

"In England Parliament had complete and absolute control over all the navigable waters within the kingdom. It could regulate navigation upon them, could authorize exclusive rights and privileges of navigation and fishing, could authorize weirs, causeways and dams for private use to be constructed in them, and could interrupt and absolutely destroy navigation in them. *(Rex* v. *Montague,* 4 B. & C. 598; *Williams* v. *Wilcox,* 8 Ad. & El. 314; *People* v. *N. Y. & S. I. F. Co., supra.)* So in this country each state (subject to limitations to be found in the Federal Constitution) has the absolute control of all the navigable waters within its limits. As said by the chancellor in *Lansing* v. *Smith,* (4 Wend. 9, 20), the state through its legislature 'may exercise all the powers which previous to the Revolution could have been exercised either by the king alone, or by him in conjunction with his Parliament; subject only to those restrictions which have been imposed by the Constitution of this State or of the United States.' "

The determinations by the judicial branch of the United States Government settling the sovereign title of the various states to their submerged lands, have been recognized, ruled upon, acquiesced in and followed also by the executive branch.

On May 14, 1793, Attorney General Randolph rendered an opinion to the Secretary of State on the capture of the British ship Grange in Delaware Bay. The question of her location when captured was at issue and the Attorney General, among other things, ruled (1 Ops. Atty. Gen. 15, 16):

> "In like manner is excluded every consideration how far the spot of seizure was capable of being defended by the United States; for although it will not be conceded that this could not be done, *yet will it rather appear that the mutual rights of the States of New Jersey and Delaware up to the middle of the river supersede the necessity of such an investigation.*" (emphasis added)

On August 4, 1862, Secretary of State Seward wrote to the Secretary of the Navy:

> "The territorial waters of a state extend seaward to the distance of a marine league from the low water mark of its coast line. They also include, to a reasonable extent, which is in many cases determined by usage, adjacent parts of the sea, such as bays, gulfs and estuaries, inclosed within headlands; and where the territory by which they are inclosed belongs to two or more states, the marine limits of such states are usually defined by conventional lines."

Not only that, The United States has over a long period of years applied for and accepted grants of land under water in New York Harbor and Long Island Sound, as well as in the Hudson River.

By chapter 196 of the Laws of 1880, the State of New York ceded jurisdiction to land under water adjacent to

Governor's Island, Bedloe's Island, Ellis Island, Fort Hamilton, Fort Wadsworth on Staten Island, and a number of other ports and islands. The grants at Fort Hamilton and Fort Wadsworth are particularly significant, because they are in the so-called lower harbor, below the Narrows, where the headlands are more than two marine leagues apart, and the ownership of the State must have depended upon its title to land within the three-mile limit. The same is even more true of lands under water in the Great Beds of Raritan Bay, which were ceded to the United States for a lighthouse by chapter 69 of the Laws of 1880.

This latter grant followed an opinion of the Acting Attorney-General of the United States to the Secretary of the Treasury, dated July 30, 1879 (16 Atty. Gen. 369). The proposed lighthouse site was situate on a shoal at Great Beds under the waters of Raritan Bay, title to which shoal was in the State of New York but jurisdiction over which was in the State of New Jersey by virtue of an agreement between the two states. New Jersey had ceded jurisdiction over the site to the United States. The Light House Board held the view that "the site being located within navigable waters of the United States, the title thereto is for that reason in the United States, and that the board may erect a light-house thereon 'without taking further action to obtain title.'" The Attorney General, however, said, in part:

> "The view of this subject entertained by the Light-House Board appears to rest upon certain general expressions used by the Supreme Court when considering the authority of Congress over navigable waters of the United States derived under the constitutional grant of power to regulate commerce, and also upon language of like character employed in an opinion of one of my predecessors (dated September 20, 1875) touching the right to establish range-lights in the waters of Saginaw River. But neither in the opinion just adverted to nor in any of the decisions of the Supreme Court is it de-

cleared that the ownership of the soil under navigable waters of the United States, within the territorial limits of a State, belongs to the General Government. On the contrary, that court has laid down the doctrine that the shores of navigable waters, and the soils under them, are not granted by the Constitution to the United States, but are reserved to the States respectively *(Pollard's Lessee* v. *Hagan,* 3 How. 202), and that the proprietorship of such shores and soils belongs absolutely to the States, subject only to the rights surrendered by the Constitution to the General Government *(Martin* v. *Waddell,* 16 Pet. 367); and this doctrine has been reaffirmed by the same court in the recent case of *Barney* v. *Keokuck,* 94 U. S. Rep. 324.

"Thus the proprietorship of the shores and beds of navigable waters within the limits of a State must be regarded as vested in the State, and not in the United States. In the exercise, however, of the power to regulate commerce granted by the Constitution, the latter may restrict the use of such shores and beds; and where lands of this description are needed to enable the General Government to perform its proper functions (as, for instance, to establish light-houses) it may appropriate them for that purpose. But this it may do, *not by virtue of any ownership in the soil,* but by virtue of the right of eminent domain—a right distinct from and paramount to the right of ownership—which exists in the General Government, * * *.

"In direct answer to your inquiry, I have the honor to submit that, the title to the site in question being, as is above shown, not already in the United States, it is not competent to the Light-House Board to erect the light-house thereon without taking further action in reference to obtaining title." (emphasis added)

Lands under water in Long Island Sound at a number of points were ceded to the United States for lighthouse purposes by chapter 432 of the Laws of 1874, after the United States, through its Treasury Department and the United States Lighthouse Board, had filed sketches or maps of the submerged sites with the Secretary of State of the State of

New York, and requested the State to adopt legislation ceding such parcels of land.

As recently as last year, the United States Coast Guard applied for and received on February 26, 1946, an easement from the Board of Commissioners of the Land Office of this State to lay telephone cable *in the Atlantic Ocean* from Rockaway Beach, New York, to Monmouth Beach, New Jersey.

Of the utmost importance to our position is the approval given by Congress (Public Res. 17, 67th Congress, 1921) to the compact entered into between the States of New York and New Jersey creating the Port of New York District. The compact was entered into pursuant to chapter 154 of the Laws of New York 1921 and chapter 151 of the Laws of New Jersey 1921 and provides in part:

> "WHEREAS, In the year eighteen hundred and thirty-four the states of New York and New Jersey did enter into an agreement fixing and determining the rights and obligations of the two states in and about the waters between the two states, especially in and about the bay of New York and the Hudson river; and
> • • •
>
> "Now, therefore, the said states of New Jersey and New York do supplement and amend the existing agreement of eighteen hundred and thirty-four in the following respects:"

Article II of the compact describes and bounds the territory included within the district. Of relevance is the course fixing the location of point J. It reads as follows:

> "thence due east twenty-five and forty-eight-hundredths miles more or less, crossing the county of Monmouth, state of New Jersey, and passing about one and four-tenths miles south of the pier of the Central Railroad of New Jersey at Atlantic Highlands to a point J of latitude forty degrees and twenty-four minutes

north and longitude seventy-three degrees and forty-seven minutes west, said point being *in the Atlantic ocean;*"

By plotting this course this point is located in the Atlantic Ocean approximately 17 miles southeast of Coney Island, 13 miles southeast of Rockaway Point, about 10½ miles east of the southern end of Sandy Hook and about 4 miles southeast of Sandy Hook Light. From point J the course runs northeast 21.16 miles to point K, which is located about 5 miles east of the passenger station of the Long Island Railroad at Jamaica on the mainland of Long Island. By its approval of this compact the Congress recognized the rights of the States of New Jersey and New York to amend their boundary line agreement and to extend that boundary line agreement to a point in the Atlantic Ocean far beyond the low-water mark.

See, *Hamburg American Steamship* v. *Grube,* 196 U. S. 413, *supra,* for a discussion of the effect of the approval by Congressional Act of the 1834 compact between New Jersey and New York.

POINT III

The principles expounded by the plaintiff in relation to the points covered by this brief are without support in law, violate the law of property, and are an unwarranted attack upon the sovereignty of the State of New York.

We have taken the liberty to quote at length from the opinions of this Court and of other Courts and from other documents in support of the sovereign title of this State to the lands under its coastal waters. Since its birth as a free and independent sovereign, New York has owned, con-

trolled and disposed of its submerged lands in accordance with the doctrine as recognized and enunciated by the decisions of this Court covering a period of more than a century.

The plaintiff now comes to this tribunal with a novel attack upon these decisions. The Government's criticisms of the decisions may be listed under four main divisions:

A. This Court proceeded upon an erroneous theory in holding that the title to their submerged lands, inland and tidal, was in the original States as an attribute of their sovereignties (Plaintiff's Brief, pp. 72, 143-153). The plaintiff, although attacking the "unsound rule of those decisions", does not urge that they be overruled, and makes the gratuitous suggestion that the Court reaffirm the decisions "lest any doubts be permitted to arise as to the rights established by them." (Brief, p. 143). This statement challenges not only the clear language of the decisions of this Court from *Martin* v. *Waddell* in 1842, down to date, restating and reaffirming this so-called "unsound rule", but challenges every concept of the law of property.

We have examined critically the plaintiff's argument on this point and the authorities cited. We find nothing sufficiently meritorious to brand the long established and oft-repeated doctrine of the original States' sovereign rights as a "legal fiction" (Brief, p. 153). More important, we find no decisions of this Court which give the slightest indication of doubt of the soundness of the principle.

B. The plaintiff argues also that none of the cited decisions of this Court applied to the coastal waters or marginal sea, and that any reference thereto in the decisions is *obiter dictum*. It is urged, in effect, that the *loci in quo* were not in, upon or under coastal waters.

We submit that the plaintiff overlooks the broad principle involved in the cited early decisions of this Court. It was necessary for the Court to give expression to the underlying and basic separation of the Federal and State sovereignties in order to reason or sustain its determination of some specific question of conflict between their respective dominions, jurisdictions or property rights. It is clear that this Court applied the principle of State ownership to lands under coastal waters as distinguished from those under arms of the sea and under navigable waters. In *Weber* v. *Board of State Harbor Commissioners,* 18 Wall. (85 U. S.) 57 (1873) this Court held, at page 65:

> "By that law the title to the *shore of the sea,* and of the *arms of the sea* and in the *soils under navigable waters,* is, in England, in the King, and in this country, *in the state.*" (emphasis added)

Three distinct categories are thus brought within the principle: (a) the shore of the sea, (b) the arms of the sea, and (c) soil under tidewaters. Later, in 1894, the applicability of the rule to the three classifications of submerged lands was again recognized by this Court in *Shively* v. *Bowlby,* 152 U. S. 1, 11:

> "By the common law, both the title and the dominion of *the sea,* and of rivers and *arms of the sea* where the tide ebbs and flows, and of *all the lands below high-water mark,* within the jurisdiction of the Crown of England, are in the King. * * *"

The pronouncements of this Court were germane and relevant to the basic and source title of the original States to all their submerged lands. They were proper determinations by this Court in all cases in which title to or dominion over any part of such lands, coastal, tidal or inland, was at issue. This Court certainly has given these

declarations more weight than *dicta,* for in 1876 *McCready* v. *Virginia,* 94 U. S. 391, 394, it was held that it had "long been settled in this court" that each state owns the beds of all tidewaters within its jurisdiction unless granted away. The same principle was reaffirmed as the "settled law of this country" in *Illinois Central R. Co.* v. *Illinois,* 146 U. S. 387, 435, (1892). These pronouncements are in accord with this Court's holding in *Smith* v. *Maryland,* 18 Howard (59 U. S.) 71 (1855) that, among the "established principles" to be kept in view was the one that whatever soil below *low-water* mark is "the subject of exclusive propriety and ownership, belongs to the State on whose maritime border and within whose territory it lies * * *."

The plaintiff now would have the Court disregard these long established principles of the State's sovereignty on the ground that, as to coastal waters, they are *dicta.* Assuming *arguendo,* these statements are *dicta,* the plaintiff completely ignores a cardinal rule of property as proclaimed in *United States* v. *Guaranty Trust Co.,* 33 F. (2d) 533, 537 (1929), aff'd, 280 U. S. 478 (1930), that the reannouncement of a "doctrine repeatedly over a period of more than 100 years serves to establish it, not only as the consistent view of the court, but also as a rule of property upon which practical transactions have been, and are being, based."

C. The third claim by the plaintiff of the inapplicability of the decisions of this Court is to the effect that, if the ownership of submerged lands in an attribute of sovereignty the ownership of lands in the marginal sea is an attribute of national sovereignty, not of State sovereignty (Brief, p. 71). "Rights in the marginal sea", it is argued (*Id.* p. 89) "are derived exclusively from the position of the national sovereign in international affairs." And, further, it was

"the national government that sponsored the theory of the three-mile belt, and it was only through its efforts as a member of the family of nations that rights in the marginal sea were derived and finally established."

The plaintiff does admit (Brief, p. 74) that, "To be sure, the Constitution, not international law, is determinative of rights as between the States and the United States. But principles of international law, as of common law, may be of weight in construing the Constitution and in ascertaining the powers and rights of the United States which are to be implied from those plainly enumerated." The theory of the three-mile belt was adopted by the United States "in the course of conducting its external affairs." (Brief, p. 75.)

As far back as 1739, the Supreme Court of the Province of New York held, in substance, that coastal waters outside the harbor, between Sandy Hook and the Narrows, were within the bounds of one of the counties of the Colony. The Court rejected the argument that the counties nearest the scene "were bounded by the waters." *Kennedy* v. *The Sloop Mary & Margaret Thomas, Fowles Reclaimant,* 6 O'Callaghan, Documents Relative to the Colonial History of New York (1855) 154-55. This decision does not, of course, establish a three-mile limit, but it does recognize and sustain the principle that coastal waters of the Colony of New York were within the boundaries and jurisdiction of the littoral counties of the Colony. After the formation of the Union, the same principle was reaffirmed by this Court in *Manchester* v. *Massachusetts,* 139 U. S. 240 (1891), wherein it was unsuccessfully urged that the proprietary right of Massachusetts was confined to the body of the county (p. 254). And, this Court had held earlier in the case of *Harcourt* v. *Gaillard,* 12 Wheat. (25 U. S.) 523 (1827) that:

> "There was no territory within the United States that was claimed in any other right than that of some one of the confederated states; *therefore, there could be no acquisition of territory made by the United States, distinct from, or independent of, some one of the states.*" (emphasis added)

In *United States* v. *Bevans*, 3 Wheat. (16 U. S.) 336 (1818), this Court held no doubt that the cession of admiralty and maritime jurisdiction by the states to the United States was not a cession of territory or general jurisdiction to the latter. See, also, *Hamburg American Steamship Co.* v. *Grube*, 196 U. S. 407 (1905) for a discussion of the limitations of the rights of the United States under a cession for military purposes.

We reject as fallacious and of no legal merit this claim by the plaintiff that the exercise of external affairs is a valid basis for title in the United States of the lands under coastal waters. We, too, fully recognize and affirm that the Constitution is determinative of rights as between the States and the United States. We see no need to call upon international law to interpret the Constitution in questioning the property rights and sovereignty of the State of New York. Although the concept of States Rights as held by the Founding Fathers may have narrowed in the course of national development, we doubt if the implied powers of the Federal Government have ever before been invoked to upset a rule of property recognized, declared and honored by this Court since the earliest days of the Union. It is, as the plaintiff states, a new concept. The theory of the dominant sovereign has no relation to the question before this Court. If the plaintiff's theory were adopted, the stability and continuity upon which property titles rest would be shattered. The State of New York has relied upon the decisions of this Court and of its own Courts for

authoritative determinations of its sovereign rights in all its submerged lands including those under coastal waters. It has dealt with its grantees in reliance on such determinations, and respectfully urges that no new theories or concepts should now be invoked to disturb its rights or title.

The exercise by the United States of its delegated powers over foreign affairs, over admiralty and maritime matters, over the regulation of fishing, or in the defense of the nation, requires no implied powers such as would merit a claim to submerged lands.

D. A fourth contention of the plaintiff is that the individual original States made no claim whatever on the marginal sea at the time of the formation of the Union (Brief, p. 72). It is indicated in the plaintiff's argument, but not supported by authoritative decision, that the absence of the adoption of constitutional or legislative enactments by the States, since the formation of the Union, specifically extending their boundaries out to the three-mile limit, is fatal to their titles to these lands. It is claimed (Brief, pp. 100, 101) that New York never has claimed the marginal sea as being within its limits. "New York's case is particularly clear."

Under Point I of this Brief, *supra,* we have pointed out that New York's title to and dominion over these lands is not dependent upon constitutional or legislative declarations. They do not constitute the source of title. This Court has affirmatively declared and repeated, in the decisions under attack, that the original States took title to all submerged lands, upon the happening of the Revolution and before the formation of the Union, as an attribute of their sovereignty as independent States. Here, too, we rely on the precedents laid down by this Court.

We are asked by this theory of the plaintiff to overlook the declaration in 1779 by the Legislature of New York State (N. Y. Laws 1779, c. 25), set out in full in the forepart of this Brief, of the State's absolute ownership of *all* lands previously held by the Crown of Great Britain. Also, the Constitutional provision of 1846 (N. Y. Const., Art. 1, § 11; now Art. 1, § 10) of the possession of the People of the State, in their right of sovereignty, of the original and ultimate property in and to *all* lands within the jurisdiction of the State. And, the enactment of the Legislature in 1828 (N. Y. R. S. [1828] Pt. II, c. 1, T. 1, § 1) of the same declaration of original and ultimate property in and to *all* lands within the jurisdiction of the State.

We also wish to point out the inaccuracy of plaintiff's statement that New York *never* has claimed by specific language the marginal sea as being within its limits. We refer again to section 300 of the Conservation Law of New York (N. Y. Consolidated Law, c. 65). As first enacted by Chapter 318, N. Y. Laws 1912, the Marine District was defined to "include all waters in and adjacent to Long Island *and* all tidal waters of the state" except a portion of the Hudson River. The Atlantic Ocean is adjacent to the south shore of Long Island for its entire length. As amended by Chapter 350, N. Y. Laws 1925, § 1, the Marine District was described as including "all tidal waters within three nautical miles of the state coast" except the Hudson River and the East River. The East River was removed from the exception by Chapter 86, N. Y. Laws 1935, § 1.

We refer again to the compact between the States of New Jersey and New York, approved by Congress (Public Res. 17, 67th Congress, 1921), and discussed under Point II, *supra*, for further proof of affirmative legislative action

by New York State in relation to the submerged lands under the Atlantic Ocean beyond the low-water mark, and as an act of dominion and jurisdiction over said lands.

CONCLUSION

The several States, by the Declaration of Independence, asserted their separate sovereignty as independent States. The Treaty of Peace with Great Britain acknowledged each of the thirteen States to be a free, sovereign and independent state, and, under the Treaty, the King relinquished all claims to the government and proprietary and territorial rights to the specified States. The Articles of Confederation was a league of friendship entered into by the original States for their mutual and general welfare. No territorial rights of the individual States were ceded thereunder to the central government. Under the Constitution of the United States, the individual States retained all rights and powers not delegated to the United States, and specifically limited (Article I, Sec. 8) the right of the United States to exercise exclusive legislation over lands in the States in which they were located and purchased by the consent of the Legislatures of the States. No cession to the United States of the territorial rights of the individual States was made under the Constitution.

Under this fundamental structure of our form of Government, this Court has repeatedly affirmed that the original States, as an attribute of their individual sovereignties, succeeded to the title of the King and Parliament of Great Britain in and to all submerged lands, including those under coastal waters, within their respective bounds. In reliance upon its sovereign rights and title, as defined by this Court, the State of New York has exercised ownership, dominion and jurisdiction over these lands, and the

Executive Branch of the Federal Government has for many years acknowledged and recognized the State's title.

The People of the State of New York, as a Sovereign State, owns hundreds of miles of submerged and tidal lands in its coastal waters along the ocean and the Great Lakes, as well as in New York Harbor, Long Island Sound, the Hudson River, the Mohawk, Niagara and Saint Lawrence Rivers, and other inland streams and bodies of water.

Millions of dollars worth of these lands have been sold to the owners of adjacent uplands and to municipalities and they, in turn, have spent hundreds of millions of dollars in improvements. All these improvements were built and have been enjoyed by their owners in reliance upon their source of title in the State of New York. No disquieting claims, unfounded in law and based in the main on novel theories in complete disregard of the law of property and of the sovereign rights of this State, against that source should be made now.

The complaint should be dismissed.

Dated, March 3, 1947.

Respectfully submitted,

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